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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 666

MONOLITH PORTLAND MIDWEST COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Southern District of California, Central Division, rendered no formal opinion. The oral opinion of that court is set forth at pp. 524-527 of the record. The opinion of the Court of Appeals for the Ninth Circuit (R. 543) is reported at 178 F. 2d 854.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 21, 1949 (R. 555). The petition for a writ of certiorari was filed on March 13, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below erred in affirming the dismissal of the suit brought by petitioner, a war contractor seeking termination damages and injunctive relief, on the ground that petitioner had failed to utilize the available

procedures for administrative settlement and review under the Contract Settlement Act of 1944, 41 U.S.C. 101-125.

Statute Involved

The pertinent provisions of the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 101 *et seq.*, and the War Mobilization and Reconversion Act of 1944, 58 Stat. 785, 50 U.S.C. App. 1651 *et seq.*, are set forth in the Appendix, *infra*, pp. 10-15.

Statement

On June 28, 1943, petitioner contracted with Defense Plant Corporation, a former subsidiary of respondent,[1] to supervise the construction of a plant at Laramie, Wyoming to extract alumina from native anorthosite ores by a new and untried process (R. 20-68). After construction, petitioner was to operate the plant. The production of alumina and the expansion of capacity for such production was deemed "* * * important in the interest of the National Defense Program * * *", and the development of the process and facility involved in this case was specifically found to be thus essential (R. 20-21, 26, 27). Plant construction under the contract was not terminated immediately upon cessation of military hostilities in view of a finding at that time by the Director of War Mobilization and Reconversion that continuation would benefit the Government (R. 166). Subsequently, however, after some inquiry into the cost of readying the plant for operation (R. 164-165), the Director determined that it would be in the best interest of the Government to effect the termination of the operating agreement with the petitioner (R. 166). Accordingly, respondent gave petitioner a preliminary or "stop work" notice on

[1] In 1945, Congress dissolved Defense Plant Corporation and respondent succeeded to Defense Plant Corporation's rights and liabilities. Joint Resolution (Public Law 109) of June 30, 1945, c. 215, 59 Stat. 310.

July 24, 1946 (R. 166).[2] A notice of termination, pursuant to Section 202 of the War Mobilization and Reconversion Act of 1944, 50 U. S. C. App. 1657, was served on petitioner on September 10, 1946, to be effective 30 days after receipt (R. 69).

Petitioner thereupon commenced an action in the Superior Court of the State of California, County of Los Angeles (R. 2) on November 7, 1948 (R. 79), less than two months from the date of termination.[3] In that action, petitioner sought the right to possession of the plant, the opportunity to operate it, and an injunction against Reconstruction Finance Corporation's continued control of the plant. Petitioner prayed for a judgment of $516,000 to complete the acquisition and construction program and $1,200,000 for the management and operation of the plant or, as an alternative to control and operation, $7,500,000 as general damages. Also, $197,-524.76 was sought as money due and owing. (R. 18-20.)

Respondent caused the action to be removed to the United States District Court for the Southern District of California (R. 93). By answer and motion, respondent raised the defense that the complaint failed to state a claim upon which relief could be granted since petitioner had neither pursued nor exhausted its administrative rem-

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[2] The petition mistakenly refers to this communication as a termination notice (Pet. 5). The communication of July 24, 1946, explicitly stated that "* * * this is a stop work notice only and should not be construed as a notice of termination of your operating agreement" (R. 168). Petitioner's subsequent letters to respondent on July 25, 1946, and August 21, 1946, clearly show petitioner's understanding that the contract had not been formally terminated (R. 438, 440). Both courts below found that notice of termination was given, as described above, on September 10, 1946 (R. 504, 544-545). And the court below observed that petitioner's letters of July and August, 1946, were no more than a protest against expected termination "* * * and a demand for a continuance of the contract. * * *" (R. 552).

[3] Petitioner's refusal to utilize the required administrative procedure for termination under the Contract Settlement Act may be traced to its insistence that its contract with respondent was to be treated, in so far as benefit to petitioner was involved, as a contract with a private corporation (R. 438, 441). And see Pet. Br. 2.

edies under the Contract Settlement Act of 1944, 41 U. S. C. 101 *et seq.* (R. 396, 397-398). The issue thus raised was brought on for a preliminary hearing (R. 398-399) which resulted in the dismissal of petitioner's suit by the district court (R. 503-505). The district judge specifically found that petitioner had not "* * * exhausted the administrative remedy afforded it by said Act. * * *"[4] The court below affirmed the district court's judgment of dismissal (R. 555).

Argument

1. The central issue presented by this case is petitioner's assertion of a right to sue the respondent upon termination of its contract without prior recourse to prescribed administrative procedures for settlement of termination claims. We submit that the question thus presented is not of great practical importance and does not merit review. As indicated in the Brief in Opposition in *Stevens* v. *Federal Cartridge Corporation*, No. 466, this Term, certiorari denied, 338 U. S. 942, substantially all war contractors, both prime contractors and subcontractors, have accepted and utilized the adminis-

[4] The district court judgment recites that the defenses urged by respondent at the preliminary hearing were treated as having been raised both under Rule 12 and Rule 56 of the Federal Rules of Civil Procedure (R. 503-504). The summary disposition of the case by the district court is attacked by petitioner on the ground that issues of fact were thus improperly decided (Pet. 7; Pet. Br. 7). We see no merit to this attack. Clearly, the question whether the Contract Settlement Act required preliminary recourse and exhaustion of administrative procedures under the statute is not a question of fact. Nor does the problem of whether the contract here involved may be classified as a war contract within the meaning of the War Mobilization and Reconversion Act or the Contract Settlement Act of 1944 present any question of fact. See *infra*, pp. 6-7. As to petitioner's alternative claim, that it had in fact complied with prescribed administrative procedure by writing letters in July and August of 1946, the court below observed that petitioner had not "* * * made * * * even a colorable compliance with the Act. * * *" (R. 553). Finally, petitioner makes no contention that it actively pursued any effort to effect administrative determination of its claims prior to the time of instituting this litigation.

trative machinery provided by and under the Contract Settlement Act of 1944, with the result that the vast problem of settlement of termination claims is now substantially completed.[5] The basic congressional objective in passing the Act, the speedy disposition of such claims, has been attained within the framework of administrative settlement procedures.[6] The almost universal acceptance of administrative and review machinery under the statute for termination claim settlement stresses the inappropriateness of certiorari to review petitioner's claim, a claim which is not to our knowledge being pressed by any other war contractor, that it be excused recourse to such machinery and be permitted to proceed directly by court action.

Moreover, we suggest that the holding below is not of such compulsive nature as to make review in any way necessary. Petitioner has been remitted by the decision of the Court of Appeals to its administrative remedy. Subsequent to utilization of that remedy, petitioner may seek appropriate court review. In no sense have the courts below in this case ruled on the merits of petitioner's termination claim. Their holdings are in accord with the general principles repeatedly applied in decisions of this Court which deal with suits prematurely brought. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41; *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540; *Aircraft & Diesel Corp.* v.

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[5] Contract Terminations and Settlements, Twenty Second Report of the General Services Administration to The Congress, January 1950, p. 1: "The terminations pending settlement are slightly less than 0.08% of the total number of war contracts cancelled at the convenience of the Government since the beginning of war production and 0.68% of the amount involved." Of 320,093 contracts terminated from the beginning of war production to December 31, 1949, only 258 were pending settlement as of December 31, while 319,835 were settled as of December 31. In percentage figures, 99.9% were settled while .1% were pending settlement. Of 66.3 billions of dollars of cancelled commitments, 65.9 billions were settled as of December 31, 1949 while only .4 billion were pending settlement, or .7%.

[6] Contract Settlement Act of 1944, §1(a), (b), 41 U.S.C. 101(a), (b), Appendix, *infra*, p. 10; S. Rep. 836, 78th Cong., 2d sess., p. 1; H. Rept. 1590, 78th Cong., 2d sess., pp. 18, 19.

Hirsch, 331 U.S. 752; *Lichter* v. *United States*, 334 U.S. 782, 789-793. The lack of practical significance of the position asserted by petitioner herein is emphasized by the fact that, subsequent to the decision below, petitioner has filed an appropriate claim under Section 13(a)(2) of the Contract Settlement Act of 1944, 41 U.S.C. 113(a)(2), with respondent. Even if this filing be regarded as protective only, it underscores the fact that no substantial rights of petitioner have been impaired and that the holdings below merely guarantee to the Government the proper opportunity for administrative consideration and settlement contemplated by Congress.

2. Nor is there any merit to the principal contentions which petitioner makes in support of its claimed right of immediate access to the courts. Petitioner principally argues that its contract was not a war contract within the reach of the War Mobilization and Reconversion Act of 1944 and the Contract Settlement Act of 1944 (Pet. 2; Pet. Br. 2). Further, petitioner argues that, in any event, no prior recourse to the administrative procedure or settlement of termination claims under the Contract Settlement Act is required. In our view, the court below has carefully and completely answered these and other subsidiary contentions made by petitioner.

(a) The argument that petitioner's contract cannot be viewed as a war contract for the purpose of the statutes here involved does not even possess plausibility. If the question were considered as one of fact open to inquiry, we think it plain that the major, if not the entire purpose of the construction and proposed operation of the alumina plant, was to meet the needs of national defense. See R. 548-549 and Section 3(a) of the Contract Settlement Act, 41 U.S.C. 103(a), Appendix, *infra*, p. 10. Such was the avowed purpose of the contract according to both contracting parties. See Statement, *supra*, p. 2. The status of the contract is not, however, left open to inquiry. As the court below observed, the War Mobilization and Reconversion Act and the Contract Settlement Act are necessarily correlated. Power and procedure for settling and adjusting termination claims under the latter statute

comes into play only upon the exercise of the termination power created in the "contracting agency" by Section 202 of the War Mobilization and Reconversion Act. 50 U.S.C. App. 1657, Appendix, *infra*, p. 15. "Contracting agency" is specifically defined to include the respondent and its subsidiary corporations under both statutes. 50 U.S.C. App. 1676; 41 U.S.C. 103(g), Appendix, *infra*, p. 11. Thus qualified as a "contracting agency," respondent exercises final and conclusive authority to categorize any given contract as a war contract, a determination which "shall not be reopened,, annulled, modified, set aside, or disregarded * * * in any suit, action, or proceeding except as provided in this chapter." Sections 3(m) and 20(b) of the Contract Settlement Act of 1944, 41 U.S.C. 103(m), 120(b), Appendix, *infra*, pp. 11, 14-15.[7] There is, of course, no dispute that the contract in this case was administratively classified as a war contract (R. 69, 166).

(b) Petitioner's second contention, as noted above, is to the effect that, while it may elect to pursue its administrative remedy, it is not compelled to do so. In rejecting this contention, the court below found it sufficient to point to the essential congressional purpose involved in the passage of the Contract Settlement Act, which is the expert and speedy handling of termination claims, and to the obvious result of judicial permission to contractors to "* * * bypass the administrative determination * * *" (R. 550). Specific sections of the statute and regulations thereunder, read in the light of this clear congressional purpose, fully support the conclusion thus reached. Power to issue necessary and appropriate regulations is specifically given to the Adminis-

[7] Throughout this proceeding, petitioner has contended that, for the purpose of this case, respondent is a purely private corporation and not to be considered as an agency of the United States (Pet. Br. 2). We think it too well settled to require citation that the United States may freely utilize its corporate agencies for governmental purposes. That it has done so in connection with the subject matter of the instant case is completely clear from the specific references, set out above, to respondent as contracting agency for the purpose of the statutes here involved.

trator of General Services and to contracting agencies. Section 4(c) of the Contract Settlement Act, 41 U.S.C. 104(c), Appendix, *infra*, pp. 11-12. Pursuant to authority conveyed by the Section, respondent required the submission of a claim for administrative determination in the event that settlement could not be reached by agreement. 13 C.F.R. (1944 Sup.) 50.3.* Power to require primary recourse to administrative procedures established by regulation seems clearly to have been intended by Congress. See H. Rep. 1590, 78th Cong., 2d sess., p. 24. Only after utilization and exhaustion of the administrative procedure can the contractor go to court. Those provisions of the statute which describe the terms upon which recourse to courts may be obtained by contractors clearly contemplate prior administrative consideration and handling of termination claims. Section 13(a), (b), (c) of the Contract Settlement Act of 1944, 41 U.S.C. 113(a), (b), (c), Appendix, *infra*, pp. 12-14. The right to judicial review is specifically geared to a review of administrative findings or to action in the event that the contracting agency fails to make requested findings. See H. Rep. 1590, *supra*, p. 25.

(c) In connection with both of the above-described arguments, petitioner infers the unconstitutionality of retroactive application of the War Mobilization and Reconversion Act or the Contract Settlement Act to the contract here involved. As pointed out by the court below, it has long been well settled that the United States may terminate and settle war contracts without answering in court for damages, that the power so to terminate does not depend upon specific provisions of a contract, and that the power may be retroactively applied (R. 547 and cases cited). *United States* v. *Corliss Steam-Engine*

* 13 C.F.R. (1944 Supp.) "50.3 *Settlements not made by agreement.* * * * (b) In cases where the contractor and the company are unable to settle a claim in full by agreement and the contractor desires to have the company determine the amount due on the claim or unsettled part pursuant to clause (2) of subsection (a) of section 13 of the act, the contractor shall make written demand on the company for such determination."

Company, 91 U.S. 321. Moreover, the "* * * judicial determination even of constitutional issues ordinarily must await the exhaustion of prescribed administrative remedies. * * *" (R. 547.) *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752.

Conclusion

For the reasons set forth above, we respectfully submit that the petition for certiorari should be denied.

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March 1950

APPENDIX

Contract Settlement Act of 1944 (58 Stat. 649, 41 U. S. C. 101 *et seq.*).

SECTION 1. The Congress hereby declares that the objectives of this Act are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

(d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

* * * * * * * *

SEC. 3. As used in this Act—

(a) The term "prime contract" means any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term "prime contractor" means any holder of one or more prime contracts.

* * * * * * * *

(c) The term "war contract" means a prime contract or a subcontract; and the term "war contractor" means any holder of one or more war contracts.

• • • • • • • •

(g) The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, the Smaller War Plants Corporation, and the War Production Board.

(h) The term "termination claim" means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement.

• • • • • • • •

(m) The term "final and conclusive", as applied to any settlement, finding, or decision, means that such settlement, finding, or decision shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee, or agent of the United States or in any suit, action, or proceeding except as provided in this Act.

SEC. 4. • • •

(b) In order to insure uniform and efficient administration of the provisions of this Act, the Director, subject to such provisions, by general orders or general regulations—

(1) shall prescribe policies, principles, methods, procedures, and standards to govern the exercise of the authority and discretion and the performance of the duties and functions of all Government agencies under this Act; and

(2) may require or restrict the exercise of any such authority and discretion, or the performance of any such duty or function, to such extent as he deems necessary to carry out the provisions of this Act.

(c) The exercise of any authority or discretion and the performance of any duty or function, conferred or imposed on

any Government agency by this Act, shall be subject to such orders and regulations prescribed by the Director pursuant to subsection (b) of this section. Each Government agency shall carry out such orders and regulations of the Director expeditiously, and shall issue such regulations with respect to its operations and procedures as may be necessary to carry out the policies, principles, methods, procedures, and standards prescribed by the Director. Any Government agency may issue such further regulations not inconsistent with the general orders or regulations of the Director as it deems necessary or desirable to carry out the provisions of this Act.

* * * * * * * *

SEC. 11. (a) In order to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes, each contracting agency—

(1) shall provide its prime contractors with notice of termination of their prime contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security without permitting unneeded production or performance;

(2) shall establish procedures whereby prime contractors shall provide affected subcontractors with immediate notice of termination; and

(3) shall permit the continuation of some or all of the work under a terminated prime contract whenever the agency deems that such continuation will benefit the Government or is necessary to avoid substantial injury to the plant or property.

(b) Whenever a contracting agency hereafter directs a prime contractor to cease or suspend all or a substantial part of the work under a prime contract, without terminating the contract, then, unless the contract provides otherwise, (1) the contracting agency shall compensate the contractor for reasonable costs and expenses resulting from such cessation or suspension, and (2) if the cessation or suspension extends for thirty days or more, the contractor may elect to treat it as a termination by delivering written notice of his election so to do to the contracting agency, at any time before the contracting agency directs the prime contractor to resume work under the contract.

* * * * * * * *

SEC. 13. * * *

(b) Whenever any war contractor is aggrieved by the

findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U. S. C. 41 (20)), except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in his contract or, if no time is specified, within thirty days after the delivery to him of the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Director, but failure of the contracting agency to act on any such required protest or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the contracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest

or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

(3) Notwithstanding any contrary provision in any war contract, the Appeal Board or court shall not be bound by the findings of the contracting agency, but shall treat such findings as prima facie correct, and the burden shall be on the war contractor to establish that the amount due on his claim or part thereof exceeds the amount allowed by the findings of the contracting agency. Whenever the Appeal Board or court finds that the war contractor failed to negotiate in good faith with the contracting agency for the settlement of his claim or part thereof before appeal or suit thereon, or failed to furnish to the agency any information reasonably requested by it regarding his termination claim or part thereof, or failed to prosecute diligently any protest or appeal required to be taken under subsection (c) (1) (ii) of this section, the Appeal Board or court (i) may refuse to receive in evidence any information not submitted to the contracting agency; (ii) may deny interest on the claim or part thereof for such period as it deems proper; or (iii) may remand the case to the contracting agency for further proceedings upon such terms as the Appeal Board or court may prescribe. Unless the case is remanded, the Appeal Board or court shall enter the appropriate award or judgment on the basis of the law and facts, and may increase or decrease the amount allowed by the findings of the contracting agency.

(4) Any such proceedings shall not affect the authority of the contracting agency concerned to make a settlement of the termination claim, or any part thereof, by agreement with the war contractor at any time before such proceedings are concluded.

* * * * * * * *

SEC. 20. * * *

(b) Any contracting agency may prescribe the amount and kind of evidence required to identify any person as a war contractor, or any contract, agreement, or purchase order as a war contract for any of the purposes of this Act. Any deter-

mination so made that any person is a war contractor, or that any contract, agreement, or purchase order is a war contract, shall be final and conclusive for any of the purposes of this Act.

• • • • • • • •

War Mobilization and Reconversion Act of 1944 (58 Stat. 785, 50 U. S. C. 1651 *et seq.*).

SECTION 101. • • •

(b) The following agencies shall be placed within the Office of War Mobilization and Reconversion and shall exercise their functions subject to the general supervision of the Director:

(1) Office of Contract Settlement, created by the Contract Settlement Act of 1944.

SEC. 202. Any contracting agency shall terminate prime contracts for war production whenever in the opinion of the agency the performance under such contracts will not be needed for the prosecution of the war, and shall not continue performance under such contracts merely for the purpose of providing business and employment, or for any purposes other than the prosecution of the war, unless the Office of War Mobilization and Reconversion finds that the continuation of some or all of the work in process under any such contract will benefit the Government or is necessary to avoid substantial physical injury to a plant or property.

• • • • • • • •

SEC. 601. When used in this Act—

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(b) The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, and the Smaller War Plants Corporation.